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No. 500

In the Supreme Court of the United States

OCTOBER TERM, 1960

ROBERT G. THOMPSON, APPELLANT

v.

SUMNER G. WHITTIER, ADMINISTRATOR OF VETERANS' AFFAIRS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

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OPINION BELOW

The opinion of the District Court is reported at 185 F. Supp. 306 and is set forth as Appendix "A" to the Jurisdictional Statement.

JURISDICTION

Suit was instituted under 28 U.S.C. 1331, 28 U.S.C. 2201, and Sec. 10 of the Administrative Procedure Act, 5 U.S.C. 1009, to review a decision of the Administrator of Veterans' Affairs forfeiting the payment of monthly disability benefits under Section 4, Public Law 144, 78th Congress (former 38 U.S.C. (1952 ed.) 728, now 38 U.S.C. 3504). A three-judge court was convened in response to appellant's appli-

cation under 28 U.S.C. 2282 and 2284 (R. 105). The final order of the District Court granting appellee's motion for summary judgment was entered on June 29, 1960 (J.S., App. A). A notice of appeal to this Court was filed in the District Court on August 25, 1960 (R. 102). Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1253.

STATUTES INVOLVED

Public Law 144, Section 4, 78th Congress (former 38 U.S.C. 728, now 38 U.S.C. 3504), is set forth at page 2 of the Jurisdictional Statement.

Act of June 25, 1948, ch. 646, Section 1253, 62 Stat. 928, 28 U.S.C. 1253, provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Act of June 25, 1948, ch. 646, Section 2282, 62 Stat. 968, 28 U.S.C. 2282, provides in relevant part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges * * *

STATEMENT

Appellant, a citizen of the United States, served in the United States Army during World War II,

and was honorably discharged on August 23, 1943. On August 24, 1943, he filed a claim with the Veteran's Administration for compensation for service-connected disability (tuberculosis), and, on October 15, 1943, the Veteran's Administration, on a rating of 100% disability, made him an award of monthly payments of $100.00. This amount was increased by statute periodically, with the final increase, to $150.00 a month, becoming effective on December 1, 1949. Payments were made until June 30, 1951, at which time further checks could not be delivered since appellant's whereabouts were unknown (R. 23).

The Veterans' Administration, on July 9, 1951, by letter to his last known address, requested appellant to report for a physical examination on July 12, 1951 (R. 11). This he failed to do (R. 154) and no explanation was given to the Veterans' Administration for twenty-three months, nor did the Veterans' Administration have any knowledge of appellant's whereabouts during this period (R. 12). The regulations of the Veterans' Administration, 38 C.F.R. (1949 Edition), Section 3.251, provide for the suspension of benefits upon failure to report for physical examination. Section 3.266 permits resumption of such benefits after a subsequent physical examination.

Appellant had been convicted of violation of the Smith Act, but failed to surrender following the affirmance of that conviction by this Court in *Dennis* v. *United States,* 341 U.S. 494, on June 4, 1951. He was not apprehended until August 27, 1953, and is now serving his sentence for that conviction and for failing to surrender. On October 15, 1953, approxi-

mately two months after his apprehension, appellant requested reinstatement of his payments and expressed willingness to take a medical examination[1] (R. 122–123).

On June 2, 1954, while appellant's benefits were still suspended, the Chairman of the Veterans' Administration Central Committee on Waivers and Forfeitures notified him that the complete record pertaining to his claim for compensation was before that Committee to determine if a forfeiture of his benefits should be declared in accordance with the provisions of the forfeiture statute, Public Law 144, 78th Congress, July 13, 1943, 38 U.S.C. 728 (R. 60). After receiving appellant's letter replying to its charges (R. 124–135), the Committee held an informal hearing on October 4, 1954, at which appellant was represented by counsel (R. 137). On April 29, 1955, the Committee issued a decision forfeiting appellant's benefits on the grounds that his conduct subsequent to the commencement of the Korean War on June 27, 1950, constituted rendering assistance to an enemy of the United States within the meaning of the statute (R. 63).[2]

[1] Appellant was subsequently given a physical examination on June 21, 1955, which showed that his tuberculosis had reached a state of arrest. The compensation to which he would be entitled was thus reduced to $67 a month (R. 110).

[2] On March 2, 1956, appellant's wife was notified that, under Section 4, Public Law 144 (now 38 U.S.C. 3504(b)), which provides for an apportionment of the benefits to which a veteran would be entitled but for the forfeiture described in 38 U.S.C. 3504(b), action had been taken to award her an apportionment of 20% or $13.40. The award was made effective October 19, 1953, the date of receipt of evidence showing her husband's

An appeal was taken to the Board of Veteran's Appeals, and a hearing was held on July 10, 1956. On July 31, 1956, the Board affirmed the decision of the Committee (R. 22–41). Approximately two years after this decision, on June 27, 1958, appellant petitioned the Board for reconsideration of its holdings in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Wellman* v. *Whittier*, 259 F. 2d 163 (June 1958). Although it referred to the untimeliness of this petition,[3] the Board considered it on the merits, and in a written opinion of May 5, 1959, affirmed its prior decision (R. 42–56).

On July 8, 1959, appellant filed this suit in the District Court for a declaratory judgment and injunctive relief (R. 1–4). The complaint alleges that, as a result of the forfeiture decision, the appellee refuses to pay appellant benefits he is entitled to receive. The complaint further alleges that the forfeiture statute is unconstitutional and that appellee (the Administrator) acted unconstitutionally and in excess of his statutory authority. The complaint's prayer is for a judgment (1) declaring that the statutory provision for forfeiture is unconstitutional; (2) declaring that the forfeiture of plaintiff's pension benefits is illegal and unconstitutional; (3) ordering the defend-

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whereabouts. The amount was increased to $21.77 monthly on March 15, 1956, on the birth of a child, and appellant's wife was further informed that, upon evidence of her custody of a former child, an additional increase of $8.38 monthly would be considered (R. 151).

[3] Rule 20 of the Board's Rule of Practice (R. 168) provides that such petitions must be made within one year.

ant to pay to the plaintiff the veterans benefits due; and (4) granting such other and further relief as may be appropriate.

On the ground that the complaint sought a "permanent injunction restraining the enforcement, operation and execution of an Act of Congress," appellant requested the convening of a three-judge statutory court, pursuant to 28 U.S.C. 2282 and 2284 (R. 105). This request was granted and a three-judge court heard argument on appellant's motion for summary judgment and appellee's cross-motion for summary judgment and for dismissal of the complaint. On June 27, 1960, the District Court (Circuit Judge Fahy dissenting) granted appellee's motion for summary judgment and dismissed the complaint. This appeal followed. Appellant has also filed notice of appeal in the Court of Appeals for the District of Columbia Circuit and moved that court to hold the case in abeyance pending determination of this appeal. That motion was granted on November 4, 1960.

ARGUMENT

We do not dispute appellant's contention that this case presents substantial issues which warrant plenary consideration by an appellate court. Apart from the constitutional issues discussed in the Jurisdictional Statement, the case involves two statutory questions.[4]

[4] One of these is the application of the non-reviewability provision of 38 U.S.C. 211, which states (as enacted in the United States Code):

> "Except as provided in sections 784, 1661, 1761, and as to matters arising under chapter 37 of this title [none of which provisions are applicable to the present case], the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any

In our view, however, jurisdiction to hear this appeal resides only in the Court of Appeals.

Direct review by this Court is authorized by 28 U.S.C. 1253 only when there has been a "suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." [Emphasis added.] When the case is not one required to be heard initially by a three-judge court, direct appeal must fail. *Oklahoma Gas and Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386; *Phillips* v. *United States*, 312 U.S. 246; *Pendergast* v. *United States*, 314 U.S. 574.

Appellant's request for a three-judge district court was made under 28 U.S.C. 2282, which provides that only such a forum may grant an "interlocutory or permanent injunction restraining the enforcement, operation or any execution of any Act of Congress for repugnance to the Constitution of the United States * * *." Appellant's complaint, as noted above, demands judgment (1) declaring that the said forfeiture statutes are unconstitutional, "(2) de-

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law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

The other question (to which appellant does not advert and which was not presented to the court below) is whether the term "rendering assistance to an enemy of the United States or of its allies," as used in the forfeiture statute, should be deemed to refer only to the offenses described in Article 81 of the Articles of War of 1920 and 1948 ("Relieving, Corresponding With, Or Aiding The Enemy") or the current successor provision, Article 104 of the Uniform Code of Military Justice (1950) ("Aiding the Enemy"). The Government does not contend that it has been shown that appellant violated the offenses described by these provisions of military law.

claring that the forfeiture of [appellant's] pension benefits is illegal and unconstitutional; (3) ordering the [Administrator] to pay to [appellant] the veteran's benefits * * *."

Obviously, the basic object of appellant's suit was to obtain review of the Administrator's action forfeiting his benefits. It is true that the complaint asked that the statute in question be declared unconstitutional, but a single-judge court can pass upon the validity of an Act of Congress in a suit to which 28 U.S.C. 2282 does not apply. See, *e.g., Reid* v. *Covert,* 351 U.S. 487; *Woods* v. *Miller Co.,* 333 U.S. 138; *Fleming* v. *Rhodes,* 331 U.S. 100.

There are sound reasons why the instant suit should be treated as one to which 28 U.S.C. 2282 is inapplicable. The "review" aspect of the appellant's action was primary, and the injunctive relief requested was incidental or secondary. More pointedly, appellant's complaint did not in terms request injunctive relief against the enforcement of the challenged statute. It is the request for such relief, as this Court has held, which may make appropriate or necessary the convocation of a three-judge court. In *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 304 U.S. 243, 250, the Court observed:

> Section 3 [of the Act of August 24, 1937, 50 Stat. 752, the precursor of present Section 2282 of Title 28 U.S.C.] does *not* provide for a case where the validity of an Act of Congress is *merely drawn in question, albeit that question can be decided,* but only for a case where there

> is an application for an interlocutory or permanent injunction to restrain the enforcement of an Act of Congress. * * * Had Congress intended the provision in § 3 * * * to apply whenever a question of the validity of an Act of Congress became involved, Congress would naturally have used the familiar phrase "drawn in question" * * *. [Emphasis added.]

It is not the long-range effect of a court's decision, but the pleadings and the remedy sought, which determine whether a three-judge court must be convened. *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977.

The present case is similar in all essential respects to *Flemming* v. *Nestor*, 363 U.S. 603, and we concur in Judge Fahy's view that *Nestor* controls the jurisdictional question presented here. In that case, an action was brought against the Secretary of Health, Education, and Welfare to order him to restore the plaintiff's social security benefits, which had been forfeited under a provision similar to the forfeiture statute in this case. After observing that Nestor's action did draw the constitutionality of the statute into question, this Court stated:

> However, the action did no more. It did not seek affirmatively to interdict the operation of a statutory scheme. A judgment for appellee would not put the operation of a federal statute under the restraint of an equity decree; indeed, apart from its effect under the doctrine of *stare decisis*, it would have no other result than to require the payment of appellee's benefits.

Then, citing the *Garment Workers* case, *supra,* this Court held that the action was one for a single district judge. We believe the same to be true here.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction.[5]

Respectfully submitted.

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DECEMBER 1960.

[5] As noted in the Statement, *supra*, appellant has perfected an appeal to the Court of Appeals. The Court of Appeals will, of course, have jurisdiction even though the case was initially heard by three judges. *Healy v. Ratta*, 289 U.S. 701.

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